Supreme Court, U.S.
FILED
93-1026 NOV 26 1993
OFFICE OF THE CLERK

CASE NO. _____

THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1993

LAWRENCE MOORE,

PLAINTIFF/PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; PAUL BLACKWOOD; WAYNE LOVIN; JAMES WESTFALL; TOM PRIDEMORE; JOSEPH HEISLER; BOB FLOWERS; AND BAKER ELECTRIC, INC.,

DEFENDANTS/RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lawrence Moore, Pro Se
Box 84525
San Diego, Ca 92138
Ph. (619) 452-9537

QUESTIONS PRESENTED FOR REVIEW

1. What is the statute of limitations for a breach of contract action when the contract is a Union constitution?

2. Can the doctrine of *res judicata* be invoked to defeat a breach of contract action against an employer when the employer was not a party to the underlying suit, the underlying cause of action was not the same, and the final judgment was not even on breach of contract?

3. Can union and employer parties to a collective bargaining agreement collude against a third party beneficiary by interpreting a CBA provision to give them the "absolute" right to discriminatorily blacklist him from employment?

4. Do union members have democratic rights to vote on all changes in their organization's dues bylaws, or no right to vote on decreases?

5. Do officers breach fiduciary duties to union members by holding repeated votes on dues increases until one passes and by then vetoing a bylaw to reduce dues to the *status quo ante*?

6. Can a jury verdict award for breach of

contract, violations of rights, assaults, and battery be eviscerated by denial of attorneys' and expert witness fees and other legitimate out-of-pocket expenses, without any findings?

7. Can a prevailing party's legitimate costs of suit be eviscerated by an award of the same costs to losing union defendants, and by fees for a union witness he never subpoenaed?

8. Can a court insist on hearing rebuttal witnesses' testimony first, refuse to let them testify before the jury, and then delete their testimony from the record?

9. Can claims for discriminatory operation of a union hiring hall be dismissed *sua sponte* at trial for failure to exhaust the hostile CBA remedies, which were alleged to be futile?

10. Are union officers "immune" from suit for violations of the Labor Management Relations Act ("LMRA") and Labor-Management Reporting and Disclosure Act ("LMRDA")?

LIST OF ALL PARTIES

All parties appear in the caption.

TABLE OF CONTENTS

page

CITATIONS TO OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

TABLE OF STATUTES 1

STATEMENT OF THE CASE 2

ARGUMENT 10

QUESTION I (at page 10, *infra*):

Breach of contract under LMRA § 301 has the statute of limitations of a forum State and the question should be settled because the decision of the Ninth Circuit to use the NLRA six months statute conflicts with decisions of this Court, and resolution of the issue will contribute to the development of national labor law.

QUESTION II (at page 13):

Res judicata cannot be abused to permit the CBA parties to reject plaintiff from employment where the claim, parties and judgment relied on were different, and the decision is in conflict with another United States court of appeals and

every other court in the land, calling for an exercise of this Court's power of supervision.

QUESTION III (at page 15):

Union and employer parties who negotiate job referral procedures for union-administered hiring halls may not blacklist the third party beneficiaries without cause, and resolution of this federal question of first impression was decided in conflict with applicable decisions of this Court, and should be settled.

QUESTION IV (at page 20):

The LMRDA was specifically enacted to check abuses of union members' right to vote on their dues, and the court should settle this question because it is an issue of first impression, and goes to the very intent of the statute.

QUESTION V (at page 25):

Union officers breach fiduciary duties to members by repeating dues referendums until the favored proposal passes, and the Ninth Circuit has rendered a decision in conflict with other courts of appeals on the same matter, calling for resolution of the question by this Court.

QUESTION VI (at page 30):

Plaintiff should have received fees for his two attorneys and expert witness, and his other out-of-pocket expenses. Denial of the damages conflicts with other circuits and this Court, and departs from the accepted and usual course of judicial proceedings so far as to call for exercise of the Court's power of supervision.

QUESTION VII (at page 37):

Plaintiff's deposition costs were awarded to defendants and he was taxed for a witness he never subpoenaed, conflicting with this Court's decisions, violating district court Local Rules and departing so far from the accepted course of judicial proceedings as to call for exercise of this Court's power of supervision.1/

1/. Plaintiff forgoes argument on the three remaining questions (suppression of testimony and deletion of it from the record, exceptions to requirements of exhaustion of CBA remedies on grounds of futiiity, and dismissal of union agents as "immune" from LMRA and LMRDA suits) because the questions are well settled contrary to the Ninth Circuit's *ad hoc* holdings, and are naked abuses of the accepted and usual course of judicial proceedings. They are mentioned in the statement of the case, and other arguments also apply to those three. Plaintiff wishes to preserve the questions for briefing.

TABLE OF AUTHORITIES

page

American Federation of Musicians v. Wittstein,
379 U.S. 171, 85 S.Ct. 300,
13 L.Ed.2d 214 (1964) 22

Ames v. Westinghouse Electric Inc.,
864 F.2d 289 (3rd Cir. 1988) 35

Auto Workers v. Hoosier Corp.,
383 U.S. 696, 86 S.Ct. 1107
16 L.Ed.2d 192 (1966) 11, 12

Bise v. I.B.E.W. Local 1969,
618 F.2d 1299 (9th Cir. 1979) 33

Bowen v. USPS,
&459 U.S. 212, 103 S.Ct. 588,
74 L.Ed.2d 402 (1983) 37

Breininger v. Sheetmetal Workers Int'l Ass'n Local Union No. 6,
___ U.S. ____, 110 S.Ct. 424,
107 L.Ed.2d 388 (1989) 4, 35

Czosek v. O'Mara,
397 U.S. 25, 90 S.Ct. 770,
25 L.Ed.2d 21 (1970) 36

De Arroyo v. Sindicato de Trabajadores Packinghouse,
425 F.2d 281 (1st Cir. 1970) 37

Del Casal v. Eastern Airlines, Inc.,
634 F.2d 295 (5th Cir. 1981) 35

Del Costello v. International Broth. of Teamsters,
462 U.S. 151,103 S.Ct. 2281,
76 L.Ed.2d 476 (1983) 11, 12

Dutrisac v. Caterpillar Tractor Co.,
749 F.2d 1270 (9th Cir. 1983) 34

Finnegan v. Leu,
456 U.S. 431, 102 S.Ct. 1867,
72 L.Ed.2d 239 (1982) 22

Ford Motor Co. v. Huffman,
345 U.S. 330, 73 S.Ct. 681,
97 L.Ed 1048 (1953) 17

Glidden Co. v. Zdanok, 370 U.S. 530,
82 S.Ct. 1459, 8 L.Ed.2d 671 (1962) 12

Gurton v. Arons,
339 F.2d 371 (2d Cir. 1964) 27

Hall v. Cole,
412 U.S. 1, 93 S.Ct. 1943,
36 L.Ed.2d 702 (1973) 21, 23, 25, 31, 32

Harrison v. United Transportation Union,
530 F.2d 558 (4th Cir. 1975)
cert. denied, 425 U.S. 958,
96 S.Ct. 1739, 48 L.Ed.2d 203 (1976) 37

Hensley v. Eckerhart,
461 U.S. 424, 103 S.Ct. 1933,
76 L.Ed.2d 40 (1983) 38

Hodgson v. Lodge 851, Int. Ass'n
of Mach. & Aerospace Wkrs.,
454 F.2d 545 (7th Cir. 1971) 23

IBEW, AFL-CIO v. Hechler,
___ U.S. ____, 107 S.Ct. 2161
95 L.Ed.2d 791 (1987) 11

Kerr v. Shanks,
466 F.2d 521 (9th Cir. 1972) 28

Linn v. United Plant Guard Workers,
383 U.S. 53, 86 S.Ct. 657,
15 L.Ed.2d 582 (1966) 29

Local 357, Internat'l Bro. of Team., etc.
v. N.L.R.B., 365 U.S. 667,
81 S.Ct. 835, 6 L.Ed.2d 11 (1961) 16

Local No. 82, Furniture & Piano Mov. v. Crowley, 467 U.S. 526, 104 S.Ct. 2557, 81 L.Ed.2d 457 (1984) 23

Machinists, Lodge 776 V. Texas Steel Co., 669 F.2d 279 (5th Cir. 1981) 33

Miller v. U.S. Postal Service, 825 F.2d 62 (5th Cir. 1987) 15

Mills v. Electric Auto-Life Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) 32, 33

Moore v. Local 569 of the IBEW, 989 F.2d 1534 (9th Cir. 1993) 9, 28

Moore v. Local 569, I.B.E.W., 653 F.Supp. 767 (S.D.Cal. 1987) 4

Motor Coach Employees v. Lockridge, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971) 35

National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949) 10, 16, 21

National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967) 23

NLRB v. Mountain Pacific, 270 F.2d 425 (9th Cir. 1959) 6

Northcross v. Board of Education of Memphis City Schools, 447 U.S. 911, 100 S.Ct 2999, 64 L.Ed.2d 862 (1980) 35

Pignotti v. Local No. 3, Sheet Metal Wkrs Int. Ass'n., 477 F.2d 825 (8th Cir. 1973) 27, 28

Pignotti v. Local No. 3,
Sheet Metal Workers Int. Ass'n,
343 F.Supp. 236 (D.Neb. 1972) 28

Ross v. IBEW,
544 F.2d 1022 (9th Cir. 1976) 34

Sabolsky v. Budzanoski,
457 F.2d, at 1252 (3rd Cir.),
cert. denied, 409 U.S. 853,
93 S.Ct. 65, 34 L.Ed.2d 96 (1972) 29

Scott v. Local Union 377,
Int. Broth. of T., etc.,
548 F.2d 1244 (6th Cir. 1977) 36

Self v. Drivers, Chauffeurs, Warehousemen
and Helpers Local Union No. 61,
620 F.2d 439 (4th Cir. 1980) 34

Sprague v. Ticonic National Bank,
307 U.S. 161, 59 S. Ct 777,
83 L.Ed. 1184 (1939) 32

Steele v. Louisville & N.R. Co.,
323 U.S. 192, 65 S.Ct. 226,
89 L.Ed. 173 (1944) 17

Summit Valley Industries v.
Local 112, etc.,
456 U.S. 717, 102 S.Ct. 2116
72 L.Ed.2d 511 (1982) 34

Teamsters v. Lucas Flour Co.,
369 U.S. 95, 82 S.Ct. 571,
7 L.Ed.2d 593 (1962) 11

Textile Workers v. Lincoln Mills,
353 U.S. 448, 77 S.Ct. 912,
1 L.Ed.2d 972 (1957) 11

Thornberry v. Delta Airlines, Inc.,
676 F.2d 1240, (9th Cir. 1982) 36

Vaca v. Sipes,
386 U.S. 171, 87 S.Ct. 903,
17 L.Ed.2d 842 (1967) 17, 34

Wirtz v. Glass Blowers Assn.,
389 U.S. 463, 88 S.Ct. 643,
19 L.Ed.2d 705 (1968) 23

Wirtz v. Hotel Employees,
391 U.S. 492, 88 S.Ct. 1743,
20 L.Ed.2d 763 (1968) 22

Wooddell v. IBEW Local No. 71,
___ U.S. ___, 112 S.Ct. 494,
116 L.Ed.2d 419 (1991) 11

Zamora v. Local 11, Hotel and Restaurant Union, 817 F.2d 566 (9th Cir. 1987) 30

CITATIONS TO OPINIONS BELOW.

Moore v. Local 569, Intern. Broth. of Elec. Workers, 653 F.Supp. 767 (S.D.Cal. 1987)

Moore v. Local 569 of the IBEW, 989 F.2d 1534 (9th Cir. 1993)

STATEMENT OF JURISDICTION.

The opinion of the court of appeals was filed on April 1, 1993. An order and amended opinion was filed on June 28, 1993. An order denying all petitions for rehearing was filed on August 30, 1993.

Jurisdiction was proper in the district court under 18 U.S.C. § 3231, 28 U.S.C. 1331. Appellate jurisdiction was proper under 28 U.S.C. § 1291. This court has jurisdiction to hear this matter pursuant to Rule 10 of the Supreme Court Rules.

TABLE OF STATUTES.

page

Labor Management Relations Act
§ 301 (29 U.S.C. 185) 10, 11

Labor Management Reporting and Disclosure
Act § 2 (29 U.S.C. 401) 22, 23, 33

Labor Management Reporting and Disclosure
Act § 101 (29 U.S.C. 411) 20-25, 32, 33

Labor Management Reporting and Disclosure
Act § 501 (29 U.S.C. 501) 26, 28

STATEMENT OF THE CASE.

At a union meeting in May, 1984 Moore was assaulted and battered by a Local 569 officer while attempting to speak against increases in union dues. The proposals had been voted down several times in preceding months. The bylaw passed and was approved by the Intern'l Union (IBEW) as required by the IBEW constitution.

Moore filed internal union charges against the involved officers under the constitution. The IBEW did nothing. He then proposed a bylaw reducing dues to the original level, which was passed by members despite officers' scheduling of voting for the day after Christmas, but the IBEW president refused to approve it. Summary judgment was granted to all parties on the dues issue prior to trial.

After the May, 1984 meeting Moore was regularly accosted by sergeant at arms Flowers at Local 569 meetings and in the hiring hall, and several times Flowers brandished a gun. Blackwood agent Westfall directed Flowers to interfere with Moore when he rose to speak at

meetings, and Westfall and agents Lovin and Pridemore, in a group with Flowers, regularly shouted Moore down at meetings.

Local 569 business manager Blackwood and president Heisler refused to permit Moore to speak at union meetings and shut off his mike when he tried. He filed charges against those officers. Blackwood let Flowers live at Local 569 and paid him "consulting fees." The trial testimony supported all of that.

In April, 1985 Moore was knocked down by Flowers and other officers while attempting to attend a union meeting, and Flowers threatened to beat Moore up in IBEW investigator Robbins' presence. One Blackwood agent also threatened to have Moore taken care of "permanently." His charges to the IBEW had no effect and the IBEW officers refused to even act after learning Moore intended to file this suit.

He also had trouble getting work because job calls were not coming through the hiring hall. Moore began asking around and discovered that relatives of officers, their friends, and

political supporters were getting jobs without going through the hiring hall.2/

Moore had to find work on jobs in other Locals, making it impossible for him to be in Local 569's hiring hall for morning job calls. In October, 1985 Moore took a job referral to Baker Electric Inc, whom he did not know and had never worked for.

Mr. Baker was the contractors' association (NECA) main officer and chief negotiator. He rejected Moore by saying he had the "absolute" right to reject anyone sent to him through the collective bargaining agreement (CBA) referral procedure. Moore's replacement was hired from the bottom of the out of work list that day.

2/. The claim for discriminatory operation of the hiring hall by Blackwood, Lovin, Pridemore and Westfall was for violating both the LMRDA and LMRA, and defeated summary judgment motions until this Court rejected such LMRDA claims in *Breininger v. Sheetmetal Workers Int'l Ass'n Local Union No. 6*, ___ U.S. ___, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989), whereupon the district court also dismissed the LMRA claim *sua sponte*, saying Appeals Committee remedies had not been exhausted, ignored Moore's futility allegations and said it was a "disfavored action." But see *Moore v. Local 569 Intern. Broth. of Elec. Workers*, 653 F.Supp. 767 (S.D.Cal. 1987).

Moore filed a grievance against Baker for rejecting him, but that was denied without a hearing, and filed a complaint with the CBA referral procedure overseer Appeals Committee on Blackwood's backdooring of the replacement to Baker. Blackwood administrated the referral procedure and he testified before the Committee that the replacement was hired independently by Baker as a superintendent and not backdoored.

The Appeals Committee was made up of the manager of NECA, who was hired by NECA officer Baker, union officer Hartnett who was appointed by Blackwood (against whom the complaint was filed), and an "arbitrator" hired by Blackwood.

The Committee found that Blackwood did not backdoor the replacement to Baker Electric and he was hired outside of the referral procedure. The Committee also *sua sponte* made the finding that Baker had the absolute right to reject Mr. Moore. The Committee had no jurisdiction over employers or over the "right to reject" section of the CBA referral procedure.

The entire CBA referral procedure and the

grievance procedure, as well as most language in the CBA, was "negotiated" by the IBEW and national NECA and made mandatory language in all Local Unions' CBAs. Blackwood testified at trial that the IBEW ordered him to interpret the right to reject as absolute.3/

Moore then filed a petition to vacate the Appeals Committee's decision for exceeding its jurisdiction but the district court denied the petition. No complaint was ever filed against Baker with the Committee and Baker was never a party to that proceeding.4/ The court granted Baker summary judgment on Moore's breach of

---

3/. The NLRB actually demanded the boilerplate referral procedure language be included in CBAs of Building Trades unions which operated hiring halls to prevent union discrimination against non-union workers. *NLRB v. Mountain Pacific*, 270 F.2d 425, 427 (9th Cir. 1959)

4/. The court denied a motion to consolidate the cases, and found denial of the petition to vacate was *res judicata* to dismiss Baker here. Even when the court acknowledged that Baker was never a party to the suit to vacate the finding of the Committee it stated dishonestly, "When the committee ruled that plaintiff's complaint against an employer, Baker Electric, lacked merit, plaintiff filed the present lawsuit in state court." See Appendix, p. 4. At trial the court finally decided Moore never complained to the Appeals Committee about Baker Electric Inc.

contract claim, and granted directed verdicts to the IBEW and Local on grounds the parties negotiated the right to reject as absolute.5/

At trial Local 569's office manager, after first lying, admitted Blackwood ordered her to telephone Moore's replacement at home and offer him the job with Baker Electric. There was no telephone dispatching in the referral procedure and the replacement was over two hundred names behind Moore on the CBA out of work list.

An exhibit introduced by Local 569 proved the replacement was hired as a general foreman, which, unlike a superintendent, must be hired through the CBA referral procedure. The court refused arbitrarily to permit administrative officers of Local 569 to be named in the suit.

At trial union officers swore they did not assault, batter or interfere with his rights, and IBEW officers swore they had no knowledge of events other than the internal union charges by Moore. Moore brought on two witnesses for rebuttal, who had been identified in discovery.

5/. See Appendix, pp. 6, 7.

The court insisted on first hearing their testimony out of the jury's presence. One man testified he witnessed the assault and battery of Moore in April, 1985. Another testified he was present when Flowers threatened Moore while IBEW agent Robbins watched, he saw IBEW counsel threaten Moore directly, and also heard counsel make a telephone threat to have Building Trades goons "take care" of Moore. The court wouldn't let the jury hear the testimony, and deleted it after assuring Moore it was in the record.6/

The court then granted directed verdict for the IBEW on claims for not acting on charges on the May, 1984 attacks (barred because of a six month statute of limitations on breaches of the constitution), and held there was not enough evidence on claims for not acting on charges on the later assaults and batteries (the excluded testimony had probably already been deleted).

Moore prevailed on all causes of action for breach of the duty of fair representation, and violations of his LMRDA § 101 rights, assaults

6/. Those witnesses are still available.

and battery given to the jury, which found that Flowers acted as an agent of president Heisler and Local 569. But the court would not present to the jury whether they were also liable with Flowers for punitive damages (Appendix, p. 14).

The court would not even comment in denying Moore's request for fees of two attorneys hired consecutively and for an expert witness, or for certain out-of-pocket expenses while acting pro se. Duplicate awards of costs of deposing the defendants were also awarded to defendants, and Moore was assessed $700.00 witness fees for an IBEW officer whom he did not subpoena.

All parties appealed and jury verdicts for Moore were affirmed. A comment he didn't know theories of damages or what were available from the IBEW was taken out of context to imply he requested only punitive damages, and the appeal court disingenuously held he, "cites no record evidence" in response to Moore's appeal of the deletion from the record of the two witnesses' testimony. *Moore v. Local 569 of the IBEW*, 989 F.2d 1534, at 1539, 1542, 1543 (9th Cir. 1993).

ARGUMENT.

I.

This petition should be granted because the Ninth Circuit, by holding an action for breach of a Union's constitution is subject to the six month statute of limitations of § 10(b) of the National Labor Relations Act, rather than the forum State's statute of limitations for breach of contract, has decided an important question of federal law which has not been, but should be, settled by this Court, and it conflicts with applicable decisions of the Court.

This issue is one of first impression for this Court, and resolution will contribute to the development of national labor law. The decision below was not one which turned solely on an analysis of the facts, and did not depend on the sufficiency of the evidence presented. *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949).

This Court decided federal jurisdiction under the LMRA § 301 is available when a union

member sues the union for breach of contract under a union constitution. *Wooddell v. IBEW Local No. 71*, ___ U.S. ___, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991). The Court also concluded that Congress, through § 301, had authorized federal courts to create a body of federal law "which the courts must fashion from the policy of our national labor laws." *IBEW, AFL-CIO v. Hechler*, 107 S.Ct. 2161 (1987) quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

Although this Court recognized in *Auto Workers v. Hoosier Corp.*, 383 U.S., at 701, 86 S.Ct., at 110 (1966), "the subject matter of § 301 is peculiarly one that calls for uniform law," quoting *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103, 82 S.Ct. 571, 576, 7 L.Ed.2d 593 (1962), it held there that because no agreement to submit disputes to arbitration was involved, Indiana's 6-year statute of limitations period for actions on unwritten contracts governed.

In *Del Costello v. International Broth. of Teamsters*, 103 S.Ct. 2281, this Court affirmed

Hoosier by stating it "relied heavily on the obvious and close analogy [to] . . .ordinary breach of contract case[s]":

> national uniformity is of less importance when the case does not involve "those consensual processes that federal labor law is chiefly designed to promote - the formation of the collective bargaining agreement and the private settlement of disputes under it," 383 U.S., at 702, 86 S.Ct., at 1111.

Id., 103 S.Ct. at 2289 (1983).

Breach of a union constitution is clearly analogous to an ordinary breach of contract. This case provides the Supreme Court with an opportunity to resolve the conflict created by the Ninth Circuit between the *Del Costello* and *Hoosier* decisions. This Court has repudiated application of the NLRA's six month statute of limitations in cases which do not involve any agreement to submit disputes to arbitration, and where ordinary breach of contract cases are clearly more analogous, but has not expressly overruled it. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962).

II.

The petition should be granted because the Ninth Circuit, by holding that a suit in which Baker Electric was never a party and the issue was not breach of contract (to vacate a finding by a joint union-employer hiring hall overseer committee) was *res judicata* to grant a summary judgment on a breach of contract action against Baker Electric, has thereby rendered a decision in conflict with the decision of another United States court of appeals on the same matter. In deciding the federal question by misapplication of the *res judicata* doctrine, the Ninth Circuit conflicts with the applicable decisions of this Court and every court in the land.

This conflict involves an important federal question regarding the integrity of contractual remedies for CBA third party beneficiaries, and considering the aggressive posture of both the district court and Ninth Circuit, the conflict is not one which is unlikely to recur. The *res judicata* ruling does not result from a unique factual situation, nor involve variations in

factual bases between conflicting rulings.

The conflict can be effectively resolved by only the Supreme Court, because the system of collective bargaining ensures industrial peace and is of national interest. Whether the Ninth Circuit may defeat claims of blacklisting by aberrations of the well settled law such as *res judicata*, which create disagreements in lower courts, should be promptly resolved.

The court of appeals for the Ninth Circuit has itself overstepped boundaries of accepted procedure by rendering a decision sanctioning such a departure by the district court, and has itself departed so far from accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

The district court held its own decision to affirm a decision by the CBA referral procedure Appeals Committee was *res judicata* on a breach of contract claim against Baker Electric Inc.

Moore's Petition to Vacate was based on CBA language which excluded the right to reject and contractors from the committee's jurisdiction.

At trial the court admitted its error by not vacating the decision, but refused again to vacate it under F.R.Civ.P. 60. Baker Electric was never a party to the action to vacate the Appeals Committee decision (Appendix, p. 5).

Because neither the parties nor cause of action in Moore's action to vacate a decision of the referral procedure Appeals Committee were identical to Moore's breach of contract claim, the Ninth Circuit rendered a decision in conflict with decisions of other U.S. appellate courts on the same matter. *Cf., Miller v. U.S. Postal Service*, 825 F.2d 62 (5th Cir. 1987).

III.

The petition should be granted because the Ninth Circuit, by deciding that the union and employer parties who agreed on and negotiated all qualifications for referrals to jobs under a collective bargaining agreement may then also blacklist a qualified third party beneficiary by insisting on an absolute right to reject him from employment without cause, has decided an

important federal question which has not been, but should be, settled by this court, and has decided the question in a way that conflicts with applicable decisions of this Court.

This issue is one of first impression for this Court, and resolution will contribute to the development of national labor law by the affirmation that blacklisting of third party beneficiaries in union-administered-CBA-created hiring halls is a violation of public policy. The decision below did not turn solely on the analysis of the facts, and it did not depend on the sufficiency of the evidence presented. See *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949).

The hiring hall, under the law as it now stands, is a matter of negotiation between the parties. *Local 357, Internat'l Bro. of Team., etc v. N.L.R.B.*, 365 U.S. 667, 676, 81 S.Ct. 835, 840, 6 L.Ed.2d 11 (1961).

Every contract imposes upon each party a duty of good faith and fair dealing in its

negotiation, performance and enforcement. Restatement of Contracts 2d, § 205. Moore was rejected from employment with the intent of frustrating his enjoyment of contract rights.

Baker's and the Unions' contention they had an absolute right to reject Moore violated the CBA. Since Baker obviously did not reject all electricians referred by the union it clearly wished to discriminate against Moore. Federal law prohibits parties to collective bargaining from enforcing provisions of CBAs which operate to discriminate against some members of the bargaining unit in the absence of a rational basis for such discrimination. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202-203, 65 S.Ct. 226, 89 L.Ed. 173 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-339, 73 S.Ct. 681, 97 L.Ed 1048 (1953).

The union has a statutory duty to fairly represent all of its members, both in the conduct of collective bargaining and in the enforcement of the resulting collective bargaining agreement. *Vaca v. Sipes*, 386 U.S.

171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

The CBA referral procedure preamble reads:

> Section 4.01. In the interest of maintaining an efficient system of production in the industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and of eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for employment. (emphasis added)

The provisions Baker relied on to reject Moore and which create the Appeals Committee are mandatory from the IBEW and read:

> Section 4.03. The employer shall have the right to reject any applicant for employment.
> Section 4.16. It shall be the function of the Appeals Committee to consider any complaint of any employee or applicant for employment arising out of the administration by the Local Union of sections 4.04 through 4.13 of this Agreement.

Within the context of those three passages the IBEW, Local 569 and Baker insisted that employers have an absolute right to reject from employment any CBA third party beneficiary. It is duplicitous for Baker Electric, the IBEW and

Local 569 to insist that a right to reject can be invoked without cause, because alternate invocations can only be in bad faith.

Because Baker and the union agreed to CBA provisions for being listed on and referred to jobs as qualified electricians, and negotiated and agreed to protections for the third party beneficiaries' interests, a properly referred electrician can't be rejected without "cause" unless there is a bad faith reason.

The "applicants for employment" referred to in CBA § 4.01 are third party beneficiaries. The "orderly procedure of referral" is embodied in § 4.11, which creates an "out of work list" "in chronological order of the dates they register their availability for employment."7/

7/. The "legitimate interests of the employees in their employment status" is controlled by § 4.05 which places electricians in one of four "priority" Groups based on experience (years in the trade), residency, qualifications (pass the examination or be certified by training), and xenophobia (must work under the CBA for one of the last four years before placed in Group I). Baker and the Unions who negotiated and signed the CBA agreed that the Union will administer all the conditions providing for electricians' orderly referral and for protection of their Group status. Moore was in priority Group I.

When a third party beneficiary to the CBA has been placed in his relative priority group and referred in order by the administrator of the referral procedure, it is clearly a breach of the CBA to reject the qualified electrician referred to the job under the very conditions negotiated and agreed to by the contractor.

IV.

The petition should be granted because the court of appeals, by holding that the Labor Management Reporting and Disclosure Act (1959), specifically enacted to check abuses of union members' rights, may be literally interpreted to negate members' voting rights on the union's dues bylaws and limit voting rights only to the increases sponsored by officers, has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided it in such a way that conflicts with applicable decisions of this Court.

This issue is one of first impression for the Supreme Court, and resolution of it will

contribute to the development of national labor law by affirming that federal courts will not, as a member of the Joint Subcommittee on Labor-Management Reform Legislation put it,

> "toy with subtleties and shades of meaning and mere politeness when we confront the sordid but expansive prospect of intraunion dictatorship and its sequel in violence and threats of violence."

(Cong. Rec. 10191, Senate, June 18, 1959). The decision below did not turn solely on analysis of facts, and did not depend on the sufficiency of the evidence presented. *National Mutual Ins. Co. v. Tidewater Transfer Co., supra.*

Application of the decisions of the Supreme Court cited below to the case at hand is clear and unmistakable, and the Ninth Circuit failed to follow those precedents.

This Court decided the evident purpose of LMRDA § 101 is to safeguard and preserve actual union democracy and was "specifically designed to promote the 'full and active participation by the rank and file in the affairs of the union.'" *Hall v. Cole*, 412 U.S. 1, 7-8, 93

S.Ct. 1943, 1947, 36 L.Ed.2d 702 (1973), quoting *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 182-183, 85 S.Ct. 300, 307, 13 L.Ed.2d 214 (1964).

The Ninth Circuit's interpretation of LMRDA § 101(a)(3) here has deprived members of "full and active participation," and has ignored this Court's finding that § 101 "was the product of congressional concern with widespread abuses of power by union leadership." *Finnegan v. Leu*, 456 U.S. 431, 435, 102 S.Ct. 1867, 1870, 72 L.Ed.2d 239 (1982).

This Court has held the LMRDA's overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections. See *Wirtz v. Hotel Employees*, 391 U.S. 492, 497, (1968). That protection of members' right to vote includes "elections or referendums." § 101(a)(1).

This Court has also repeatedly rejected such literal interpretations of the provisions of the LMRDA as embraced by the Ninth Circuit:

> We have previously "cautioned against a literal reading" of the LMRDA. *Wirtz v. Glass Blowers Assn., supra*, 389 U.S., at 468, 88 S.Ct., at 646. Like much federal labor legislation, the statute was "the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives congress sought to achieve." *Ibid.* (citing *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 619, 87 S.Ct. 1250, 1254, 18 L.Ed.2d 357 (1967).

Local No. 82, Furniture & Piano Mov. v. Crowley, 104 S.Ct. 2557, 2566 (1984).8/

> [T]he courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words." Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich.L.Rev. 819, 852 (1960).

Crowley, at 2565, n.17; *Hall*, at 12, n.17.

The legislative history of the Act negates the Ninth Circuit's literal interpretation of

---

8/. See also Justice STEVENS' caution against a literal reading, citing to the Declaration of Findings, Purposes and Policy of the LMRDA at § 2(b) stating, "[T]he. . .Act was enacted to protect the rights of individual union members from overreaching by their leaders." (emphasis added). *Hodgson v. Lodge 851, Int. Ass'n of Mach. & Aerospace Wkrs.*, 454 F.2d 545, 555 (7th Cir. 1971). LMRDA § 2 is at Appendix, p. 19).

§ 101(a)(3). The Library of Congress' Analysis of House Committee amendments to the Kennedy-Ervin Bill, which became the Landrum-Griffin Bill passed verbatim as the Act, stated:

> The Senate bill provides that dues and initiation fees may be changed only by (1) a majority secret vote at a general meeting; (2) majority vote in a referendum; or (3) in case of a national union by a majority vote at a convention. (emphasis added)
>
> The House committee retains the above two methods as far as local unions are concerned.

(Daily Cong. Rec., A6634, July 30, 1959)9/

As LMRDA co-sponsor Griffin said:

> The bill of rights. . .guarantees to union members. . .they will have equal rights and treatment within their union; that they will have the right to participate in union meetings and to express their views; that their dues and initiation fees will not be increased arbitrarily; that they will not be unjustly disciplined by union officials. These basic guarantees are hardly new or novel - they are the essential and fundamental rights every American citizen is guaranteed in the Bill of Rights of the Federal constitution.

(Cong. Rec. 15530, House, Aug. 11, 1959)

9/. The Kennedy-Ervin bill, passed in the Senate on April 25, 1959, was the original, and the identical Landrum-Griffin bill introduced in the House on July 24, 1959 became the LMRDA.

See also this Court's finding that LMRDA § 101 "guarantees equal 'political' rights to all union members," and "stability and fairness in the assessment of dues." *Hall v. Cole*, 412 U.S., at 8, n.12, 93 S.Ct., at 1947 (1973).

Clearly, the Ninth Circuit's affirmation of the district court's literal interpretation of § 101(a)(3) to give union members "qualified" rather than "full and active" voting rights on their organization's bylaws changes conflicts with applicable decisions of this Court.

V.

The Ninth Circuit, by holding that officers of Local 569 and the International Union do not breach fiduciary duties to members by repeating referendums until their favored proposal passes (here a dues increase), has rendered a decision in conflict with the decision of other courts of appeals on the same matter.

By deciding that officers, who have only a right to <u>correct</u> bylaws under the constitution of the Union, did not breached fiduciary duties

or contracts created in the constitution by the veto of the subsequent dues decrease bylaw, the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

This conflict involves an important federal question regarding the scope and the embodiment in the LMRDA by congress of the clear intention that members have the right to full and active participation in their Union's affairs. Local and IBEW officers have dealt with the Union as an adverse party within the meaning of LMRDA § 501 by refusing to adopt the properly passed bylaws of the organization, and also breached their fiduciary duties to members by bad faith use of a constitution provision in vetoing the properly passed bylaw reducing dues.10/

The conflict is not one which is unlikely to recur, because it is recurring throughout the Ninth Circuit. The dispute does not result from a unique factual situation, nor involve variations in factual bases between conflicting

10/. LMRDA § 501 is at Appendix, p. 26.

rulings. Local 569's bylaws have been raised to 6% of gross wages since the district court's ruling. The court also stated officers could bring back dues increases for votes as often as they wanted because the legislature does it all the time. Another suit is on appeal and some area IBEW locals' dues are now at 10% of wages.

The conflict can be effectively resolved by only the Supreme Court, because there is also a conflict between the Second Circuit and other circuits over the scope of fiduciary duties of union officers (*Cf.*, *Gurton v. Arons*, 339 F.2d 371 (2d Cir. 1964) with cases cited infra), and the conflict has permitted aberrations of the well settled law which create disagreements in lower courts, and should be promptly resolved.

The Ninth Circuit is in conflict with the Eighth Circuit decision that repeat referendums by officers to deny union members' LMRDA voting rights is a violation of both § 101 and § 501. *Pignotti v. Local No. 3 Sheet Metal Wkrs Int. Ass'n.*, 477 F.2d 825 (8th Cir. 1973). In that case local union members were confronted with

repeated votes and even a trusteeship until an International Union favored proposal passed.

The Eighth Circuit analyzed the legislative history of LMRDA § 501 and affirmed a district court finding that the Local and International officers violated both § 411 and § 501 and,

> ". . . set out to obtain the participation of Local #3 in the National Plan, whether the majority of the Union wanted the Plan or not * * * that the purpose of the trusteeship was to prevent any further action of the members toward implementing the vote to discontinue the Plan." *Pignotti v. Local No. 3 Sheet Metal Workers Int. Ass'n*, 343 F.Supp. 236, 242-243 (D,Neb.1972).

Id., 477 F.2d, at 830.

The Ninth Circuit, by stating the lower "court properly concluded that no breach of fiduciary duty occurred," also overstepped the bounds of accepted procedure and ignored *Kerr v. Shanks*, 466 F.2d 521 (9th Cir. 1972), where it found that wrongful denial of union member's right to institute a referendum was a breach of fiduciary duty. *Moore*, 989 F.2d, at 1543.

The Ninth Circuit's validation of the IBEW president's veto of the members' vote conflicts

with the Third Circuit, which recognized,

> [C]ourts have not hesitated to strike down so-called "authorized" union conduct, alleged to be based on a rule or by-laws fairly interpreted, where such conduct violates the provisions of the Landrum-Griffin Act.

Sabolsky v. Budzanoski, 457 F.2d, at 1252 (3rd Cir.), *cert. denied*, 409 U.S. 853, 93 S.Ct. 65, 34 L.Ed.2d 96 (1972).

This Court recognized that issues involved in labor relations are sufficiently critical to justify broad protection. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). Both the Local and IBEW argued incessantly they had no good faith duty to members, but the bad faith refusal to reduce dues also violates the bylaws and constitution.

By making this *ad hoc* decision conflicting with its own case law, the court of appeals has decided a federal question arbitrarily, and has departed from the accepted and usual course of judicial proceedings so far, or sanctioned such a departure by the district court, as to call for exercise of the Court's supervision powers.

VI.

Ninth Circuit affirmation, without comment, of district court denial of attorneys fees and expert witness fees and the other out-of-pocket expenses of plaintiff without comment, rendered a decision in conflict with other circuits and this Court, and its own case law on the same matters. Such an affirmation departs so far from the accepted and usual course of judicial proceedings in deciding an important federal question of damages as to call for this Court to exercise its powers of supervision.

The Ninth Circuit previously reversed such a denial of attorneys fees for an LMRDA § 101 action and refused to defer to the discretion of the lower court because no reason was given. *Zamora v. Local 11, Hotel and Restaurant Union*, 817 F.2d 566 (9th Cir. 1987). But here neither court gave any reason for the arbitrary denial.

Application of the Supreme Court precedents cited *infra* to this situation are unmistakable and clear, but the court of appeals failed to follow that precedent. By affirming the *ad hoc*

district court decision, the Ninth Circuit has overstepped bounds of accepted procedure, and sanctioned the departure by the district court, and calls for an exercise of supervision.

This conflict involves an important federal question regarding damages suffered by members who must take their union to court because it failed to represent him as envisioned in that concept of collective bargaining embraced by the congress and federal courts. The situation does not evolve from a unique factual situation nor involve variations in factual bases between the conflicting rulings, as cases cited show.

The conflict can be effectively resolved by only the Supreme Court, because the system of collective bargaining ensures industrial peace and is one of national interest. Whether a federal court may create disagreements in the federal courts and deny damages to a successful plaintiff who sued his union for failing to do what it is obliged should be promptly resolved.

In *Hall v. Cole* this Court established that federal courts "may award attorneys fees when

the interests of justice so require." 412 U.S. at 4 (1973). By denying attorneys fees to the plaintiff, the Ninth Circuit has affirmed the district court's displeasure with the expressed intent of Congress to provide for fees by their support for the "Landrum-Griffin" bill. *Id.*, at 12, n.18, 19. As the court of appeals found there, "Not to award counsel fees in cases such as this would be tantamount to repealing the Act by frustrating its basic purpose." *Hall*, 412 U.S. at 13. Awarding such fees "is part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166, 59 S. Ct 777, 780, 83 L.Ed. 1184 (1939).

Federal courts do not hesitate to exercise that inherent equitable power when "overriding considerations indicate the need for such a recovery." *Mills v. Electric Auto-Life Co*, 396 U.S. 375, 391-392, 90 S.Ct. 616, 625, 24 L.Ed.2 d. 593 (1970).

By successfully litigating several LMRA and LMRDA claims plaintiff conferred a "substantial

benefit on members of an ascertainable class," and "the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread costs proportionately among them." *Mills v. Electric Auto Lite*, 396 U.S. at 393-394, 90 S.Ct., at 626. Plaintiff rendered a substantial service to the union and its members. By vindicating his own rights he dispels a chill cast upon the rights of others.

Reimbursement of the plaintiff's attorneys' fees out of the [union] treasury simply shifted the costs of litigation to "the class that has benefitted from them and that would have had to pay them had it brought the suit." *Id.*, at 397, 90 S.Ct., at 628.

An award of attorneys' fees serves the dual purpose of compensation and deterrence, because "This sanction is necessary lest federal labor policy be frustrated by judicial condonation of dilatory tactics that lead to wasteful and unnecessary litigation." *Machinists, Lodge 776 V. Texas Steel Co.*, 669 F.2d 279, 284 (5th Cir. 1981). *Bise v. I.B.E.W. Local 1969*, 618 F.2d

1299, 1306 (9th Cir. 1979) citing *Ross v. IBEW*, 544 F.2d 1022 (9th Cir. 1976).

In *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1275 (9th Cir. 1983) the union was ordered to pay costs and attorney's fees, which represented damage, not attorney fees per se, and did not violate the American Rule. Citing *Summit Valley Industries v. Local 112, etc*, 102 S.Ct at 2116 (1982), the appeals court stated:

> an exception to the American Rule cannot be justified solely on the ground that a losing defendant's wrongful conduct forced the plaintiff to resort to litigation. *Id.* Here, however, the expense...incurred in obtaining legal representation in the district court in his contractual grievance...is not merely a result of the harm [the union] did him; it is the harm itself.

The applicable law on damages in such cases was set forth in *Vaca v. Sipes*, 386 U.S. 171, 197, 87 S.Ct. 903, 920 (1967) where this Court stated, "The governing principle then, is to apportion liability between the employer and the union according to the damage caused by the fault of each"; *Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 61,*

620 F.2d 439, 444 (4th Cir. 1980); *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295, 301 (5th Cir. 1981); *Ames v. Westinghouse Electric Inc.*, 864 F.2d 289 (3rd Cir. 1988).

Duty of fair representation is an essential means of enforcing fully the principle that "no individual union member may suffer invidious, hostile treatment at the hands of the majority of his co-workers." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473 (1971).

Federal courts have jurisdiction to hear fair representation suits whether or not they are accompanied by claims against employers. *Breininger v. Sheetmetal Workers Int'l Ass'n Local Union No. 6*, 110 S.Ct. 425, 434 (1989). A union does not shed its duty merely because it is allocating job openings among competing applicants. In the union hiring hall there is no balance of power. *Id.*, at 437.

Plaintiff had no training, and needed an economist and C.P.A. to present extensive data using accepted accounting and analysis methods

of earnings, pension and income tax records of cross-sections of the electricians similarly situated to him in San Diego County to prove losses of earnings and fringe benefits.

The Ninth Circuit has held that such expert witness fees are allowable if the party seeking recovery could show "special circumstances," to be determined by the court on the basis of the "practical litigation needs of the party." *Thornberry v. Delta Airlines, Inc.*, 676 F.2d 1240, (9th Cir. 1982), citing *Northcross v. Board of Education of Memphis City Schools*, 447 U.S. 911, 100 S.Ct 2999, 64 L.Ed.2d 862 (1980). Plaintiff's pro se status is a perfect example of the "exceptional circumstances" justifying the imposition of expert witness fees as costs.

The Sixth Circuit has decided that attorney and expert witness fees and other out-of-pocket expenses incurred in doing what the union was obliged to but failed to do are recoverable as damages. *Scott v. Local Union 377, Int. Broth. of T., etc.*, 548 F.2d 1244 (6th Cir. 1977), citing *Czosek v. O'Mara*, 397 U.S. 25, 29, 90

S.Ct. 770, 25 L.Ed.2d 21 (1970); *Harrison v. United Transportation Union*, 530 F.2d 558, 562 (4th Cir. 1975), *cert. denied*, 425 U.S. 958, 96 S.Ct. 1739, 48 L.Ed.2d 203 (1976); *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F. 2d 281, 293 n.17 (1st Cir. 1970).

The right of the individual employee to be made whole is of paramount importance. *Bowen v. USPS*, 459 U.S. 212, 222, 103 S.Ct. 588, 595, 74 L.Ed.2d 402 (1983).

VII.

The Ninth Circuit's affirmation of awards of plaintiff's deposition costs to defendants and taxing him for fees for a witness he never called conflicts with applicable decisions of this Court, and by mitigating prevailing party plaintiff's legitimate costs of suit by awards of those same costs to losing union defendants both the court of appeals and the lower court violated district court Local Rules, departing so far from the accepted and usual course of judicial proceedings as to call for an exercise

of this Court's power of supervision.

Application of the Supreme Court precedent cited below to the case at hand is unmistakable and clear, but the Ninth Circuit did not follow that precedent in deciding who was entitled to costs of suit as the prevailing party.

Despite a jury verdict for plaintiff on all causes of action presented, the appellate court affirmed the district court's finding that the union defendants were "prevailing parties" too, and its duplicate award of plaintiff's costs of depositions to Local 569 defendants and witness fees for an IBEW officer not subpoenaed. Both this Court and the Local Rules of the district court had clearly defined a "prevailing party."

Plaintiff was the prevailing party in this action as this Court described the standard in *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). Under any consideration of the results obtained, the plaintiff succeeded in litigation and should be awarded the costs of his suit. District court Local Rules stated, "If each side recovers in

part, ordinarily the party recovering the larger sum will be considered the prevailing party."10/ There was no counterclaim.11/

The appellate court's repudiation of the Local Rules of the district court in a way that also conflicts with the applicable decision of this Court, has departed from the accepted and usual course of judicial proceedings in order to sanction a similar repudiation of its own rules by the lower court, and such an *ad hoc* repudiation mocks the "rule of law" and calls for exercise of this Court's supervision power.

Dated: _____ _____

Lawrence Moore

_____

10/. See Appendix, p. 30-31.

11/. But judicial condonation of these Unions' dilatory tactics has caused recurrence of these conflicts. After filing this lawsuit Moore was assaulted repeatedly (with guns), battered, was blacklisted and demoted to Group II on the out-of-work list, brought before union trial boards twice, fined, suspended, six other bylaws were vetoed, he was ostracized monthly in the Union newsletter and after Blackwood, Lovin, Westfall and Pridemore were dismissed as "immune" from suit as Union officers they brought him before a third union trial board, fined him $6,000.00, and expelled him for suing them, and Pridemore used the Appeals Committee to try to demote him to Group III. Those issues are also on appeal.

APPENDIX

page

Order Granting Summary Judgment to Baker Electric Inc 2

Order Granting Motion To Dismiss (Baker from Case No. 87-0634-B) 3

Order directing verdict for IBEW defendants 6

Order directing verdict for IBEW Local 569 defendants 7

Final Order 13

Order denying attorneys fees 15

Order re petitions for rehearing 16

Labor Management Relations Act § 301 (29 U.S.C. 185) 17

Labor Management Reporting and Disclosure Act § 2 (29 U.S.C. 401) 19

Labor Management Reporting and Disclosure Act § 101 (29 U.S.C. 411) 22

Labor Management Reporting and Disclosure Act § 501 (29 U.S.C. 501) 26

District court Local Rule 265-5 30

District court Local Rule 265-13 31

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 85-1719-B

ORDER GRANTING BAKER ELECTRIC'S

MOTION FOR SUMMARY JUDGMENT

Defendant BAKER ELECTRIC, INC.'s Motion for Summary Judgment/Adjudication as to Plaintiff's Second Amended Complaint came on regularly and properly for hearing before this court on June 19, 1989 at 10:30 a.m., before the Honorable Rudi M. Brewster, United States District Judge, Southern District, California. Robert Scott Dreher, McInnis, Fitzgerald, Rees, Sharkey & McIntyre, appeared on behalf of moving party, BAKER ELECTRIC, INC. Lewis Levy, Esq. and Abe F. Levy, Esq. of Levy, Goldman and Levy, appeared for responding party, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 569 (IBEW), and Mark Bennett, Esq. of Merrill, Schultz and Wolds Ltd. appeared on behalf of, SAN DIEGO CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, amicus curiam.

Plaintiff LAWRENCE MOORE appeared in propria persona.

GOOD CAUSE APPEARING THEREFORE, and based upon the parties' arguments as raised in their moving, opposing and reply papers, their oral arguments before this court and the Court's files in this matter, which are incorporated herein as though fully set forth, IT IS ORDERED THAT:

Defendant BAKER ELECTRIC's Motion for Summary Judgment as to the allegations of Plaintiffs' Second Cause of Action in their Third Amended Complaint is hereby granted;

IT IS SO ORDERED.

Dated: July 20, 1989

RUDI M. BREWSTER, JUDGE
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0634-B(M)

ORDER GRANTING MOTION TO DISMISS

This case presents the narrow issue of

whether the court should vacate the decision of an arbitration panel, the Appeals Committee. The Committee was formed pursuant to a collective bargaining agreement between Local 569 and the National Electrical Contractors Association (NECA). When the committee ruled that plaintiff's complaint against an employer, Baker Electric, lacked merit, plaintiff filed the present lawsuit in state court. Plaintiff never served Baker. Baker now moves to dismiss as to itself pursuant to Fed.R.Civ.P. 4(j).

A plaintiff must properly serve all defendants within 120 days after he files the complaint. Failure to do so entitles the improperly served defendant to dismissal unless the following conditions exist: (1) the defendant received actual notice; (2) the defendant would suffer no prejudice from the defect in service; (3) plaintiff has a good excuse for his error; and (4) the plaintiff would be severely prejudiced if the defendant were dismissed. Whale v. United States, 792

F.2d 951, 953 (9th Cir. 1986).

Plaintiff satisfies the first two criteria. Baker joined in NECA's petition to remove the case to federal court. Further more, Baker received notice of the pendency of this action when it received a Notice of Related Cases and the court's notice of transfer from Judge Keep to this court.

Plaintiff fails, however, on the third and fourth requirements. Plaintiff provides no valid reason for failing to serve Baker, assuming Baker is a proper party to the case. Rather, plaintiff attempts to explain why Baker did not need to be served, i.e., NECA is the only proper defendant. Thus, plaintiff essentially concedes that he has no good excuse and that he would not be prejudiced by dismissal of Baker. Accordingly, the court grants Baker's motion to dismiss without prejudice.

IT IS SO ORDERED.

DATED: JULY 11, 1988

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 85-1719-B

ORDER DIRECTING VERDICT AGAINST PLAINTIFF AND IN FAVOR OF DEFENDANT IBEW ONLY

This is an action against the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW"), IBEW Local Union No. 569 ("Local No. 569"), and various individual defendants who are officers, agents, and representatives of Local 569 and the IBEW, which alleges, among other things, that defendant IBEW breached plaintiff's rights under the IBEW Constitution in violation of Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185 ("LMRA"), and various provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq. ("LMRDA"), when its officers and representatives investigated and failed to take action with regard to internal union charges which plaintiff filed against

officers and representatives of Local No. 569.

This action came on for trial before a court and a jury, Honorable Rudi M. Brewster, District Judge, presiding and the court, on motion of defendant IBEW, having directed a verdict for defendant IBEW, IT IS ORDERED AND ADJUDGED that plaintiff Lawrence V. Moore take nothing, that the action be dismissed on the merits, and that defendant IBEW recover of plaintiff Moore its costs of action.

IT IS SO ORDERED.

Dated: FEB 06 1990

RUDI M. BREWSTER
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 85-1719-B

ORDER DIRECTING VERDICT AGAINST PLAINTIFF ON CERTAIN CLAIMS

This action came on for trial before a court and a jury, Honorable Rudi M. Brewster, District Judge, presiding. Plaintiff in this

action, Lawrence Moore, alleged various causes of action arising under Section 301 (29 U.S.C. §185) of the Labor Management Relations Act ("LMRA") and various provisions of the Labor Management Reporting and Disclosure Act ("LMRDA"; 29 U.S.C. §401, et seq.). Plaintiff's claims alleged, inter alia, that Local 569 violated its duty of fair representation by failing to properly process and investigate one of his grievances; that Defendants Local 569, Blackwood, Lovin, Westfall and Pridemore "disciplined" Plaintiff, within the meaning of Title I of the LMRDA, by discriminatorily treating plaintiff in the referrals of workmen, through an exclusive hiring hall arrangement, to employers signatory to collective bargaining agreements with Local 569; that Local 569 breached its duty of fair representation on the administration of its various hiring hall systems; that Defendants Local 569, Blackwood, Lovin, Westfall, Pridemore, Heisler and Flowers infringed upon

and chilled Moore's Title I rights to free speech and equal participation in the affairs of Local 569; that Defendants Local 569, Blackwood, Lovin, Westfall, Pridemore, Heisler and Flowers attempted to deprive Moore of his LMRDA Title I rights through the use of force or violence; that Defendants Blackwood, Lovin, Westfall, Pridemore, Heisler and Flowers committed the common tort of assault upon the person of Plaintiff Moore, and; that Defendants Blackwood, Lovin, Westfall, Pridemore, Heisler and Flowers committed the common tort of battery upon the person of Plaintiff Moore.

On motions of Defendants Local Union 569 of the International Brotherhood of Electrical Workers ("Local 569"), Paul Blackwood ("Blackwood"), Wayne Lovin ("Lovin"), James Westfall ("Westfall"), Thomas Pridemore ("Pridemore"), Joseph Heisler and Robert Flowers, for directed verdicts pursuant to Federal Rule of Civil Procedure, Rule 50(a):

IT IS ORDERED AND ADJUDGED as follows:

1. That Moore's Third Cause of Action, alleging a breach of the duty of fair representation arising under Section 301 of the LMRA (29 U.S.C. §185), as against Defendant Local 569 is dismissed in its entirety on the merits and that Defendant Local 569 recover from Plaintiff Moore its costs insofar as they are apportionable to said Third Cause of Action;

2. That Plaintiff Lawrence Moore's ("Moore") fourth Cause of Action, which alleged "discriminatory dispatching" under Title I of the LMRDA, 29 U.S.C. §411 et seq.), as against Defendants Local 569, Blackwood, Lovin, Westfall and Pridemore is dismissed in its entirety and that Defendants shall recover from Plaintiff Moore their costs as such are apportionable to said fourth Cause of Action;

3. That Moore's Cause or Causes of Action, as set forth in the Pre-Trial Order and subsumed, over Defendants' objections

into the Third Amended Complaint, against Local 569 for breach of the duty of fair representation, which alleged arbitrary, discriminatory, and bad faith administration of Local 569's various hiring hall systems, including but not limited to hiring hall arrangements set forth pursuant to such collective bargaining agreements as the Inside Wiremen's Agreement and the sound Agreement are dismissed in their entirety except with respect to Plaintiff Moore's allegations concerning Local 569's administration of the hiring hall system arising under the Sound Agreement. Local 569 shall recover from Plaintiff Moore its costs as such are apportionable as to those parts of the instant cause of action which were dismissed;

4. That the Eighth and Ninth Cause of Action in Moore's Third Amended Complaint, which alleged deprivation of LMRDA Title I (29 U.S.C. §411) rights of free speech and equal participation in the affairs of Local

569, be dismissed on their merits only as to Defendants Blackwood, Lovin, Westfall and Pridemore and that the aforereferenced Defendants, and only those Defendants, shall recover their costs in defense of the Eighth and Ninth Causes of Action insofar as they are apportionable to the defense of the Eighth and Ninth Causes of Action, and;

5. That the Tenth and Eleventh Causes of Action, in Moore's Third Amended complaint, which alleged the common law torts of assault and battery, are dismissed in their merits only as to Defendants Blackwood, Lovin, Westfall and Pridemore and that the afore referenced Defendants, and only those Defendants, shall recover their costs in defense of the Tenth and Eleventh Causes of Action insofar as those costs of defense are apportionable to the defense of the Tenth and Eleventh Causes of Action.

IT IS SO ORDERED.

DATED: FEB 20 1990

RUDI M. BREWSTER
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 85-1719-B

AMENDED JUDGMENT ON SPECIAL VERDICT

This case came regularly for trial before a jury on October 3, 1989, and on December 18, 1989, the jury rendered its verdict. therefore, it is ordered, adjudged, and decreed as follows:

On the first cause of action, plaintiff shall recover from defendant International Brotherhood of Electrical Workers, Local 569 ("Local 569") the amount of $43,156.31.

On the second cause of action, plaintiff shall recover jointly and severably from defendants Local 569, Heisler, and Flowers the amount of $1,000.00. The plaintiff shall also recover punitive damages in the amount of $10,000.00 from Local 569, $5,000.00 from defendant Heisler, and $2,500.00 from defendant Flowers.

On the third cause of action, plaintiff shall recover damages in the amount of

$500.00 jointly and severably from defendants Local 569, Heisler, and Flowers, and punitive damages in the amount of $1,000.00 from defendant Flowers.

On the fourth cause of action, plaintiff shall recover damages in the amount of $500.00 jointly and severably from defendants Local 569, Heisler, and Flowers, and punitive damages in the amount of $2,500.00 against defendant Flowers.

IT IS SO ORDERED.

DATED: MAR 16 1990

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 85-1719-B

ORDER DENYING PLAINTIFF'S MOTION

FOR ATTORNEY'S FEES

This matter came on for hearing on or about May 14, 1990. Appearing for plaintiff was Lawrence Moore in pro per. Defendants, IBEW LOCAL 569, JOSEPH HEISLER, and ROBERT FLOWERS, appeared by and through their counsel of record, LEVY, GOLDMAN & LEVY, by Lewis N. Levy.

GOOD CAUSE APPEARING THEREFORE, and based upon plaintiff's moving and reply papers, defendants' opposition papers, and the underlying records of this case, the court denies plaintiff's motion for attorney's fees.

IT IS SO ORDERED.

DATED: 8-9-90

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA Nos. 90-55557/90-55558/

90-55559/91-55411

ORDER

BEFORE: ALDISERT*, CANBY AND THOMPSON, CIRCUIT JUDGES. FILED AUGUST 30, 1993

A majority of the panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing *en banc*.

The full court has been advised of the suggestions for an *en banc* rehearing, and no judge of the court has requested a vote on the suggestions for rehearing *en banc*.

The petitions for rehearing are denied and the suggestions for rehearing *en banc* are rejected.

---

* The Honorable Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

THE LABOR MANAGEMENT RELATIONS ACT

(29 U.S.C. 185)

Sec. 301. (a) Suits for violation of contracts between and employer and a labor organization representing employees in an industry affecting commerce as defined in the Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the

United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as

an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Declaration of Findings, Purposes, and Policy

(29 U.S.C. 401)

Sec. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is

essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this

Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

TITLE I - BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS (29 U.S.C. 411)

Sec. 101. (a)(1) Equal Rights. - Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of Speech and Assembly. - Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable

rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, Initiation Fees, and Assessments. - Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except -

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting,

after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and

bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the Right To Sue. - No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against

such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards Against Improper Disciplinary Action. - No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

TITLE V - SAFEGUARDS FOR LABOR ORGANIZATIONS

Fiduciary Responsibility of Officers of Labor Organizations (29 U.S.C. 501)

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust

in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor

organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court

obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF CALIFORNIA

LOCAL RULES

265-5. Deposition Costs

The reporter's charge for the original deposition is taxable whether or not the same be actually received in evidence, or whether or not it is taken solely for discovery. Counsel's copies are not taxable, regardless of which party took the deposition. The reasonable expenses of the deposition reporter, and the notary or other official presiding at the taking of the deposition are taxable, including travel and subsistence. Postage cost, including registry, for sending the original deposition to the clerk for filing is taxable. Counsel's fees, expenses in arranging for taking and expenses in attending the taking of a deposition are not taxable, except as provided by statute or by the F.R.Civ.P. Fees for the witness at the taking of a deposition are taxable at the same rate as for attendance at trial. The

witness need not be under subpoena. A reasonable fee for a necessary interpreter at the taking of a deposition is taxable.

265-13. Party Entitled to costs

The determination of the prevailing party shall be within the discretion of the court in all cases except where such determination is inconsistent with statute or the F.R.Civ.P. or the rules of the appellate courts. If each party recovers in part, ordinarily the party recovering the larger sum will be considered the prevailing party. The defendant is the prevailing party upon a dismissal or summary judgment or other termination of the case without judgment for the plaintiff on the merits.